NO. 80-746

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

THOMAS W. BRADSHAW, JR., Secretary of the North Carolina Department of Transportation,
Petitioner,

v.

MARY G. P. HALL and LAWRENCE C. ROUSH,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

HAS THE STATE OF NORTH CAROLINA VIOLATED THE ESTABLISHMENT CLAUSE BY PRINTING AND CIRCULATING MILLIONS OF COPIES OF A RELIGIOUS "MOTORIST'S PRAYER" ON THE STATE HIGHWAY MAP?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980). The opinion of the United States District Court for the Eastern District of North Carolina (No. 75-14-CIV-5) is unreported. A copy of the District Court's memorandum of decision is reprinted in the Appendix to the Petition for Certiorari in this case. An Order subsequently entered by the District Court correcting footnote 1 in that Memorandum Opinion was inadvertently omitted by the Attorney General of North Carolina and is reprinted as an Appendix to Respondents' Brief.

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION:

Amendment I:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the
State wherein they reside.
No State shall make or enforce
any law which shall abridge
the privileges or immunities
of citizens of the United States;
nor shall any State deprive any
person of life, liberty, or
property without due process of
law; nor deny to any person within
its jurisdiction equal protection
of the laws.

STATEMENT OF THE CASE

Each year the North Carolina Department of Transportation publishes and distributes free of charge to the motoring public an official highway map. One side of the map is simply a road map showing highways and roads in North Carolina. The other side of the map contains scenic photographs taken from points of interest in North Carolina together with "A Motorist's Prayer":

> Our heavenly Father, we ask this day a particular blessing as we take the wheel of our car. Grant us safe passage through all the perils of travel; shelter those who accompany us by Thy mercy; steady our hands and quicken our eye that we may never take another's life; guide us to our destination safely, confident in the knowledge that Thy blessings go with us through darkness and light...sunshine and shower... forever and ever. Amen.

The stipulated facts in the case show that from 1964 through 1974, 6,174,800 official maps have been published, each containing "A Motorist's Prayer". The cost of the maps has been $448,653.00. In 1974 alone, 1,250,000 official maps including the Motorist's Prayer were printed at a cost of $98,000.00.[(App. 20-21). Citations are to the Appendix filed with the Fourth Circuit.] As the map was folded for distribution, the Motorist's Prayer was one of the primary items displayed. The plaintiffs (respondents here) were at the time of the institution of this action taxpayers and residents of North Carolina and citizens of the United States who conscientiously objected to State publication of a prayer on its offical road map. They complained through correspon-

dence to the Secretary of Transportation in June and July of 1974 about the publication of an official highway map containing a Motorist's Prayer. (App. 7, 11). The plaintiffs contended that by annually printing and distributing some 1,250,000 prayers contained on the map, the Secretary of Transportation had violated the constitutional provision against the establishment of religion. The plaintiffs (respondents in this Court) simply asked that no form of the Motorist's Prayer be included in any official highway map in the future. The Secretary of Transportation replied that all future editions of the map would contain the "Motorist's Prayer". The State of North Carolina thus made it clear that it would continue to distribute millions of copies of a

"Motorist's Prayer" unless enjoined. As a result plaintiffs brought suit on their own behalf and on behalf of a class of all persons in North Carolina who object to, oppose, and are injured by the establishment of religion maintained by the State of North Carolina's publication of the "Motorist's Prayer" on state highway maps.

Throughout the litigation in this case there has been only one issue in controversy -- whether the publication and distribution of millions of copies of the "Motorist's Prayer" on the State highway map violates the prohibition against establishment of religion contained in the First Amendment to the United States Constitution. The United States Court of Appeals for the Fourth Circuit has determined that it

does. Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980). The Fourth Circuit reversed a decision by Judge Dupree granting summary judgment to the Secretary of Transportation and denying it to the plaintiffs.

The District Court thought the case could be resolved by applying the three part test enunciated in Committee for Public Education & Religious Liberties v. Nyquist, 413 U.S. 756, 773 (1973). Applying these criteria the District Court found that the prayer passed, "albeit by a slim margin." "An affidavit filed by the State indicates that the purpose of the prayer was to promote highway safety thus fulfilling the 'secular legislative purpose', and the Court agrees that it does not serve to disseminate religious ideas but is

intended to instill in the minds of readers the inherent dangers of automobile travel and the need for constant alertness. . ." Second, the District Court found that "due to its limited audience and distribution, the prayer does not advance or inhibit religion within the meaning of McGowan v. Maryland, 366 U.S. 420 (1961). . ." Third, the District Court found that the prayer "does not excessively entangle the state in religion. . ." and finally it found that there was no compulsion to recite the prayer.

In a footnote the District Court suggested that the case merely represented "constitutional nitpicking" unworthy of serious attention from the judiciary. "One is reminded of the tempest in a teapot controversies which

swirled around the 'First in Freedom' slogan formerly embossed on license plates dispensed by the State. The Court has been pleased to note that this particular thorn in the constitutionally sensitive sides of some citizens has now been eliminated." (App. 32,33)*

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*North Carolina placed the slogan "First in Freedom" on its license plates a few years ago. The precise meaning of the phrase is obscure. Some suggested that it referred to the Mecklenburg Declaration of Independence; others that it reflected North Carolina's early insistence on the addition of a Bill of Rights to the Federal Constitution. Some citizens, apparently, interpreted the slogan to mean that North Carolina was unsurpassed in the protection of human rights. To register disagreement several black motorists taped over that portion of their license plates with removable masking tape. The result was that only the slogan "First in Freedom" was obscured. For this peaceful act of dissent they were forced to appear in court on the criminal charge of altering or concealing any portion of their license plates or "the figures and letters thereon. . ." in violation of

The United States Court of Appeals for the Fourth Circuit found that the State action in this case failed the Nyquist test. As the Fourth Ciruit noted:

> In this case the state has chosen a clearly religious means to promote its secular end. If a state could avoid the application of the First Amendment in this manner, "any religious activity of whatever

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*Continued

North Carolina General Statutes 20-63(b) and (g). Those charged with the crime are apparently the "constitutionally sensitive. . .citizens" to whom Judge Dupree refers. After several prosecutions the State Attorney General issued an opinion holding such peaceful dissent was protected expression. After the Attorney General's Opinion and the United States Supreme Court decision in Wooley v. Maynard, 430 U.S. 705 (1977) the slogan was removed from North Carolina license plates. North Carolina has, fortunately, been spared the irony of further criminal prosecutions of those who peacefully dissent from the assertion that it is "First in Freedom".

> nature could be justified by public officials on the basis that it has beneficial secular purposes." Hall v. Bradshaw, 630 F.2d at 1020-21. (Citation omitted).

The Court further found that because of its religious nature the prayer advanced religion. Finally the Fourth Circuit held that the prayer produced excessive entanglement with religion. As the Fourth Circuit noted, if various agencies of government may compose and circulate prayers, then the judiciary will find itself in the role of determining which prayers are an impermissible establishment of religion and which are not. 630 F.2d at 1021-22.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

By composing and publishing millions of copies of a "Motorist's Prayer" on its state map North Carolina has violated the constitutional provision against

establishment of religion. The State may not pursue secular objectives by the use of purely religious means. At the very least this must be so unless the State can demonstrate a compelling State interest and can further demonstrate that the State interest could not be achieved by purely secular means.

The Court has rejected and must reject the notion that the State may use religion to further its objectives, so long as the objectives are the State's and not the Almighty's.

If the State of North Carolina may use religious prayer to further highway safety, there is no logical way to prevent the proliferation of religiously oriented government publications. If there were any content left of the Establishment Clause after

such a decision, then the Court would find itself in the virtually impossible business of evaluating particular prayers and religious doctrines in government publications to determine, not whether they advanced religion (which would be permissible if, as is always the case, a secular purpose could be found) but whether they impermissibly advanced particular religious beliefs at the expense of others. Since even the blandest of prayers does advance particular theological beliefs, the judiciary would find itself enmeshed in evaluating and weighing theological doctrines. Since government sponsorship, financial support or active involvement in religious activity was prohibited by the Establishment Clause, the Court should not venture into such a theological morass.

Since the decision of the United States Court of Appeals for the Fourth Circuit correctly applied the controlling principles of law to facts apparently unique to North Carolina there is no need for this Court to review its decision.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT CORRECTLY HELD THAT STATE COMPOSITION AND DISTRIBUTION OF THE MOTORIST'S PRAYER ON THE STATE ROAD MAP CONSTITUTES AN ESTABLISHMENT OF RELIGION FORBIDDEN BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The issue of whether the State of North Carolina may compose, print and distribute millions of copies of a "Motorist's Prayer" on its State map has been thoroughly and carefully

considered by the United States Court of Appeals for the Fourth Circuit. That Court decided the issue in accordance with the commands of the First Amendment and the decisions of this Court. Since the decision of the Fourth Circuit correctly applied the controlling principles of law well settled by the decisions of this Court, there is no need for the Court to grant a writ of certiorari in this case.

Under our constitutional system, the State of North Carolina has no business printing and distributing millions of copies of a "Motorist's" or any other prayer. As this Court said in Engle v. Vitale, 370 U.S. 421 (1962):

> It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the

> business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.
> 370 U.S. at 436.

The Court warned that "a union of government and religion tends to. . . degrade religion. . . . The Establishment Clause thus stands for an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." 370 U.S. at 431-432. See also L. Levy, "No Establishment of Religion: The Original Understanding" in Judgements 169 (1972).

At this stage of American history it is easy to forget the reason which prompted the clause against establishment

of religion, a clause which in the words of Jefferson was intended to "erect a wall of separation between Church and State." Everson v. Board of Education, 330 U.S. 1, 16 (1946). Under the Establishment Clause, as the Court noted in Everson, neither a State nor the Federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1946). The government was "stripped of all power to tax, to support, or otherwise to assist any or all religions. . ." 320 U.S. at 11. The reason for the rule prohibiting government promulgation and promotion of prayers and religious observances stems not from hostility to religion, but from recognition of the gross abuses and

persecutions stemming from government attempts to promote or assist religion. As the Court noted in Everson:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. 330 U.S. 1, 8-10 (1946).

To protect and preserve the separation of Church and State the Court has

construed the Establishment Clause to strip government of all power to support or otherwise assist any or all religions by writing or sanctioning official prayers.

There seems little reason to doubt that the "prayer" in this case is religious. Indeed, the first definition of a prayer is "an address (as a petition) to God...." Webster's New Collegiate Dictionary, p. 904 (1974). The prayer in this case is addressed to "[o]ur heavenly Father" and ends with a request that His "blessings go with us through darkness and light. . .sunshine and shower forever and ever. Amen."

Before the District Court, and before the Fourth Circuit, the Secretary of Transportation argued that the "Motorist's Prayer" is constitutionally

permissible because the prayer is a prayer for a "secular" purpose -- that is for the purpose of promoting highway safety. Indeed the solemn request contained in the prayer for the assistance and blessings of our "heavenly Father . . .forever and ever. Amen" is described as "filler" designed to "increase driver awareness of safe driving . . ." Affidavit of H. Boyce Midgette, p. 1, paragraph 3. (App. 24). The District Court accepted this argument holding, in effect, that the government may compose and distribute millions of prayers so long as the purpose is the government's own, not the Almighty's. "An affidavit filed by the State indicates that the purpose of the prayer was to promote highway safety thus fulfilling the 'secular legislative

purpose'. . . ." (Appendix to Petition for Certiorari 29). Although the stipulated facts show that approximately 6,174,800 copies of the prayer had been distributed on the State map prior to the filing of the complaint in this case, the District Court concluded that "due to its limited audience and distribution, the prayer does not advance or inhibit religion within the meaning of McGowan v. Maryland, 366 U.S. 420 (1961), nor does it excessively entangle the State in religion, see Walz v. Tax Comm'n, 397 U.S. 664 (1970)." (Appendix to Petition 29). The Fourth Circuit correctly rejected such an argument.

The constitutional difficulty with the State's contention in this case is that it fails to distinguish

the "Motorist's Prayer" from a great many other prayers. Many prayers seek the Almighty's assistance for some secular purpose. The Court's argument suggests that the government may compose and distribute millions of prayers in its varied publications so long as the prayer is designed to further some secular governmental activity. Publications dealing with the weather may be accompanied by the Weatherman's Prayer; items from State or Federal Departments of Agriculture with the Farmer's Prayer or the Home Vegetable Gardener's Prayer, etc. The number, type and scope of government prayers under this theory is limited only by the imagination and industry of government prayer writers.

The suggestion that the State may sponsor religious activities so long as

its purpose is secular has been advanced before, but rejected by this Court. In Abington School District v. Schempp, 374 U.S. 203, 224 (1963), the Court was faced with an argument that voluntary Bible reading in public schools fostered various legitimate State secular purposes -- the promotion of moral values, the contradiction of the materialistic trend of our times, and the perpetuation of our institutions. The Court rejected the notion that such ends could justify State sponsorship of a religious ceremony.

> But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid,. . . .
> 374 U.S. at 224.

The place of prayers, like the place of the Bible, as instruments of religion "cannot be gainsaid." In Abington, the Court clearly recognized that government may not sponsor or promote a religious activity merely because to do so would aid the government in achieving legitimate secular objectives.

Justice Brennan made the same point in his concurring opinion in the Abington case.

> The Sunday Law Cases were different in that respect. Even if Sunday Laws retain certain religious vestiges, they are enforced today for essentially secular objectives which cannot be effectively achieved in a modern society except by designating Sunday as the universal day of rest. The Court's opinions cited very substantial problems in selecting or enforcing an alternative day of rest. But the teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve

> secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.
> Abington School District v. Schempp, 374 U.S. 203, 265 (Brennan, J. concurring).

As Justices Frankfurter and Harlan noted concurring in McGowan v. Maryland, 366 U.S. 420, 466-467 (1961):

> [I]f a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone -- where the same secular ends could equally be attained by means which do not have consequences for promotion of religion -- the statute cannot stand.
> 366 U.S. at 466-467.

While the Motorist's Prayer may be an effective means of promoting highway safety (an assertion for which the state has produced no evidence), the same effect could be obtained by means which do not promote religion.

The State's argument in this case that it may use religious means to advance secular purposes has been considered and rejected by this Court as recently as November 17, 1980. Stone v. Graham, U.S. , 66 L.Ed.2d 199 (1980). In this respect the law is now well settled. In Committee for Public Education v. Nyquist, 413 U.S. 756, 783 n. 39 (1973), Justice Powell discussed the idea that State involvement in a religious activity is constitutionally acceptable so long as the State's primary purpose is a secular one:

Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961), the Sunday Closing Laws were upheld, not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a remote and incidental effect advantageous to religious institutions... Likewise, in Schempp the school authorities argued that Bible-reading and other religious recitations in public schools served, primarily, secular purposes, including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 374 U.S., at 223, 10 L.Ed.2d 844. Yet, without discrediting these ends and without determining whether they took precedence over the direct religious benefit, the Court held such exercises incompatible with the

> Establishment Clause. See also id., at 278-281, 10 L.Ed.2d 844 (Brennan, J., concurring). Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in Tilton, in which the Court found that the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "in part have the effect of advancing religion." 403 U.S. at 683, 29 L.Ed.2d 790 (emphasis supplied).

As the Fourth Circuit noted, the District Court's conclusion that printing and distribution of millions of Motorist's Prayers by the government "does not serve to disseminate religious ideas..." cannot withstand analysis: "A prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect." Hall v. Bradshaw, 630 F.2d 1018, 1020 (4th Cir. 1980). See also, Stone v. Graham, U.S. , 66 L.Ed.2d 199 (1980).

In the Courts below the Secretary of the State Department of Transportation argued that the Motorist's Prayer is an acceptable State prayer because it is not compulsory. The District Court also concluded that lack of compulsion was a crucial factor distinguishing Supreme Court cases involving school prayers. (Appendix to Petition 29-30). This argument has been rejected by the Supreme Court. Engle v. Vitale, supra. Abington School District v. Schempp, supra. In Engle v. Vitale, 370 U.S. 421, 430 (1962) the Court noted the distinction between the Free Exercise Clause and the Establishment Clause of the First Amendment:

> Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. 370 U.S. at 430 (1962).

Accord, Abington School District v. Schempp, 274 U.S. 203, 222 (1963).

One may be tempted to argue that although the Motorist's Prayer is a violation of the Establishment Clause, it is a small, non-denominational, and not very dangerous violation. As the Court noted in Engle v. Vitale, 370 U.S. 421, 436 (1962), the answer to such arguments is contained in James Madison's "Memorial and Remonstrance against Religious Assessments," reproduced as

an Appendix to Mr. Justice Rutledge's opinion in Everson v. Board of Education, 330 U.S. at 63-65:

> Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease

> any particular sect of Christians, in exclusion of all other Sects? 330 U.S. 65.

As the Supreme Court noted in Schempp:

> [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent.... 374 U.S. at 225.

The danger of converting the trickle to a torrent is particularly great in the present case. Once the Court adopts the premise that government may print prayers to promote its secular purposes there is no logical way to prevent proliferation of religiously oriented government publications.

The Motorist's Prayer is just that. Its structure, effect, and impact are religious. By publishing millions of the prayers the State necessarily lends its help to a religious philosophy. This it must not do.

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.
> Epperson v. Arkansas, 393 U.S. 97, 103-104.

CONCLUSION

This is not a case in which the right to free exercise of religion is involved. The case does not involve the right of anyone, public official or private citizen, to pray anywhere, either in public or in private, either in public bodies or, as the Gospel According to Saint Matthew suggests, in one's closet. The sole question presented by this case is whether the government may use religious means to further secular objectives, whether it may compose prayers or religious commentary and distribute them in its myriad publications. The United States Court of Appeals for the Fourth Circuit correctly determined that such conduct by government is impermissible.

Any other decision would effectively nullify the clause of the First Amendment prohibiting the establishment of religion.

Since the United States Court of Appeals for the Fourth Circuit has correctly decided the case, and since the problem with which it dealt -- State composition and distribution of prayers in government publications -- seems not to be widespread, there is no need for this Court to grant the Petition for Certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

MARY G. P. HALL and LAWRENCE C. ROUSH, Plaintiffs,	)	NO. 75-0014-CIV-5
vs.	)	
JACOB ALEXANDER, Secretary of the North Carolina Department of Transportation, Defendant.	)	O R D E R

The first sentence is Footnote 1 of the court's memorandum of decision dated March 23, 1979 reads:

> "It is perhaps a silent commentary on the importance the parties have attached to this litigation that during this three-year period of quiescence no one seems to have inquired of the court as to when a ruling on the summary judgment motions might be forthcoming."

Counsel for plaintiffs have very properly called the court's attention to the fact that they did in fact inquire of one of the court's law clerks quite some time ago as to when a decision might be expected, a fact which a former clerk has since confirmed. The above statement therefore resulted from a faulty recollection or a failure of communications, or both. It is ordered stricken from the original opinion on file in the Clerk's Office, and the court regrets any embarrassment or concern which this mistake may have occasioned counsel.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

April 5, 1979.